Supreme Court, U.S.
FILED
JAN 12 1994
OFFICE OF THE CLERK

No. 93-503

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

WILLIAM M. LIPS,
Petitioner,

v.

COMMANDANT, UNITED STATES DISCIPLINARY BARRACKS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

PETITIONER'S REPLY BRIEF

JAN HORBALY
5310 Renaissance Court
Burke, Virginia 22015
(703) 978-7909
Counsel for Petitioner

Date: January 12, 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

I.

Whether an Article III judge—who grants a petition for a writ of habeas corpus on finding that a serviceman's constitutional rights were violated at his court-martial—erred in considering the writ because a military court "fully and fairly" considered the constitutional issues and found no error.

A.

Whether an Article III judge—who grants a serviceman's petition for habeas corpus on finding that the prosecutor's extensive references to the serviceman's post-arrest silence during *cross-examination* and *closing argument* constituted plain error—erred in granting the writ because a military court "fully and fairly considered" the constitutional issue and found no error.

B.

Whether an Article III judge—who considers a serviceman's petition for habeas corpus alleging he was denied due process of law at his trial because specific intent evidence, that is, evidence of motive, intent, plan, and design, was improperly admitted to prove general intent crimes—erred in considering the writ because a military court "fully and fairly considered" the constitutional issue and concluded that specific intent evidence was admissible to prove general intent crimes.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
A. Civilian Review of the Military	1
B. Full and Fair Consideration Standard	2
C. Conflict in the Circuits	3
D. *Doyle* Issue	4
E. Objection Preserving the *Doyle* Issue	4
1. Sufficiency of the Objection	4
2. Issue Raised on Appeal	6
3. Plain Error	7
F. Defense Initiated Inquiry into Defendant's Post-Arrest	8
G. Specific Intent Evidence Problem	9
CONCLUSION	10

TABLE OF AUTHORITIES

Cases Page

Allen v. VanCantfort, 436 F.2d 625 (1st Cir.), *cert. denied*, 402 U.S. 1008 (1971) 3
Arizona v. Fulminante, 111 S.Ct. 1246 (1991) 10
Burns v. Wilson, 346 U.S. 137, *rehearing denied*, 346 U.S. 844 (1953) 3
Davis v. United States, 411 U.S. 233 (1973) 6, 7
Doyle v. Ohio, 426 U.S. 610 (1976) 4
Hatheway v. Secretary of the Army, 641 F.2d 1376 (9th Cir.), *cert. denied*, 454 U.S. 864 (1981) 3, 4
Johnson v. Patterson, 475 F.2d 1066 (10th Cir.), *cert. denied*, 414 U.S. 878 (1973) 8
Kincade v. General Tire & Rubber Co., Inc., 635 F.2d 501 (5th Cir. 1981) 6
Lebowitz v. Wainwright, 670 F.2d 974 (11th Cir. 1982) 8, 9
Lovely v. United States, 169 F.2d 386 (4th Cir. 1948), *cert. denied*, 338 U.S. 834 (1949) 9
United States v. Frady, 456 U.S. 152 (1982) 7
United States v. Massey, 687 F.2d 1348 (10th Cir. 1982) 7
United States v. Pino, 827 F.2d 1429 (10th Cir. 1987) 8
United States v. Robinson, 485 U.S. 25 (1988) 8
Velarde v. Shulsen, 757 F.2d 1093 (10th Cir. 1985) 8
Wainwright v. Sykes, 433 U.S. 72 (1977) 7
Watson v. McCotter, 782 F.2d 143 (10th Cir.), *cert. denied*, 476 U.S. 1184 (1986) 2
Weiss v. United States, 113 S.Ct. 2412 (1993) (No. 92-1482) 10

Rules

Mil. R. Evid. 103(a) 4, 5
Mil. R. Evid. 103(d) 5, 6
Mil. R. Evid. 404(b) 9

Articles and Books

Rich, *Federal Court Scope of Review Over Military Habeas Corpus Cases*, 6 MEMPHIS ST. U.L. REV. 83 (1975) 4

PETITIONER'S REPLY BRIEF

INTRODUCTION

The issue in this case concerns the scope of civilian court review of constitutional questions raised in military trials by young men and women serving in the armed forces of the United States.

A. Civilian Review of the Military

Civilian control of the military is one of the fundamental principles upon which the American Government is based. Like the executive and legislative branches, the judicial branch has a responsibility to exercise control over the military and it does so by ensuring that the constitutional rights of American service men and women are protected in military trials.

In Lips' case three military officers, temporarily assigned to perform duty on the Air Force Court of Military Review, decided that Lips' military trial was fair and that his constitutional rights under the Fifth Amendment of the Constitution were not violated.[1]

On reviewing the military court's decisions, an Article III judge concluded that Lips' constitutional right to remain silent under the Fifth Amendment was violated when the prosecutor in Lips' court-martial impermissibly, and repeatedly, questioned Lips on cross-examination about his post-arrest silence. Pet. at 17a-18a. Based on this finding, the Article III judge granted Lips' petition for a writ of habeas corpus and ordered that Lips be given a new trial because (1) "the prosecutor obviously used peti-

[1] In three sentences the military judges decided that the prosecutor's improper comments on findings and sentencing argument did not violate the Fifth Amendment under *Doyle*, but the military judges did not decide the issue of whether the prosecutor's improper comments during cross-examination violated the Fifth Amendment. Pet. at 28a, IV.

The United States Court of Military Appeals denied Lips' petition for review of these constitutional issues. Pet. at 20a.

tioner's post-arrest silence to attack [Lips'] credibility," (2) the "evidence of guilt clearly depended upon whose story was believed"; and (3) the "prosecutor vehemently and continuously commented and questioned on the silence." *Id.* at 18a n.3.

This is precisely how civilian control of the military by the federal judiciary is intended to operate. When a service member raises an important constitutional issue in the military system, exhausts his or her military remedies, and does not obtain the relief warranted, the service member should be able to petition an Article III court for review. Where the servicemember's case has been reviewed only by military officers, there is an even greater need for members of the armed forces to have access to the civilian courts for a review of the constitutional rights denied them in military trials.

B. Full and Fair Consideration Standard

In granting the writ of habeas corpus in the present case, the District Court held that the "prosecutor's repeated comments on [Lips'] post-arrest silence" during cross-examination violated Lips' "constitutional rights guaranteed under the Fifth Amendment" and denied him "a fair trial." The District Court also ruled that the military court failed to fully and fairly consider the issue. Pet. 17a-18a.

In reversing the District Court's decision, the 10th Circuit Court of Appeals states that the military court fully and fairly considered the issue even though it did not address the issue in its opinion. Pet. at 8a n.2. "When an issue is briefed and argued before a military board of review," the 10th Circuit states, "we have held that the military tribunal has given the claim fair consideration, even though its opinion summarily disposed of the issue with the mere statement that it did not find the issue meritorious or requiring discussion." *Id.* citing *Watson v. McCotter,* 782 F.2d 143, 145 (10th Cir.), *cert. denied,* 476 U.S. 1184 (1986). Thus, because the issue was fully and fairly considered by the military court, the

10th Circuit Court of Appeals held that Lips was not entitled to relief. Pet. at 30a.

According to the 10th Circuit Court of Appeals, the District Court erred in holding that the "prosecutor's repeated comments on petitioner's post-arrest silence resulted in a violation of the constitutional rights guaranteed under the Fifth Amendment" because the Air Force Court of Military Review fully "consider[ed] the [cross-examination] issue in question" and applied "the correct legal standard in doing so," even if did not address the issue in its opinion. Pet. 17a-18a. *But see Hatheway v. Secretary of the Army*, 641 F.2d 1376, 1380 (9th Cir.), *cert. denied*, 454 U.S. 864 (1981) ("*Burns* plurality does not preclude civil consideration of the constitutional defects alleged here" where it is not clear the issue was fully and fairly considered because no military court articulated an analysis of them).

The government concedes that federal "courts have at times encountered difficulties in determining how [the full and fair consideration] standard should be applied in particular cases, see *Allen v. VanCantfort*, 436 F.2d 625, 629-630 (1st Cir.) (noting difference among courts in construing *Burns* test), *cert. denied*, 402 U.S. 1008 (1971)." Resp. at 8-9. This difficulty is clearly evident in the present case where the District Court and the 10th Circuit Court of Appeals applied the same standard and came up with completely different results.

What is unfortunate about the inconsistent application by federal courts of the full and fair consideration standard is that when the standard is applied woodenly or inappropriately, young men and women serving in the armed forces of the United States like Lips, whose case was not reviewed by the United States Court of Military Appeals, are denied the right to *any* civilian review of the constitutional issues raised in their military trials.

C. Conflict in the Circuits

Other District Courts and other Circuit Courts of Appeals have experienced similar difficulties in applying the

full and fairness standard in habeas corpus cases. *See* Rich, *Federal Court Scope of Review Over Military Habeas Corpus Cases*, 6 MEMPHIS ST. U.L. REV. 83 (1975). In addition, there is no evidence that other civilian courts agree with the way the 10th Circuit Court of Appeals applies the full and fair consideration standard. Indeed, the evidence is to the contrary. *See e.g.*, cases cited at Pet. at 21-22 nn.16-18. Further, no other court of appeals has gone as far as the 10th Circuit Court of Appeals in holding that civilian court consideration of constitutional defects is precluded where a military court has fully and fairly considered the issues without analysis or opinion. *See Hatheway v. Secretary of the Army*, *supra*.

D. *Doyle* Issue

The government does not deny that a *Doyle* violation occurred in Lips' case. Indeed, the prosecutor's cross-examination in Lips' case is much like the prosecutor's cross-examination held unconstitutional by the Supreme Court in *Doyle*. *Compare* Pet. at 7-8 with *Doyle v. United States*, 426 U.S. 610, 613-14 (1976). In addition, the purpose expressed by the prosecutor for questioning Lips about his post-arrest silence is the same purpose which the Supreme Court held unconstitutional in *Doyle*. *Compare* Pet. at 27 and 4a with *Doyle v. United States*, 426 U.S. 610, 616-17 (1976).

E. Objection Preserving the *Doyle* Issue

The government dwells on defense counsel's sole objection to the prosecutor's line of questioning on cross-examination and ignores the fact that during the trial the prosecutor commented on Lips' right to remain silent more than 50 times in cross-examination and during closing argument.

1. *Sufficiency of the Objection*

The government argues that the defense counsel's "single, unspecific objection during the middle of the prosecutor's cross-examination was inadequate to preserve the *Doyle* issue for review" and cites Mil. R. Evid. 103

(a)(1). Resp. at 12. The specific question defense counsel objected to is as follows:

> Q. I didn't ask you that, Sergeant Lips. We went through that again. Do you want to do again? You don't think the OSI [criminal investigators] would have talked to you? You don't think I [the prosecutor] would have talked to you? You don't think Captain Basten [the assistant prosecutor] would have talked to you? You don't think the security police would have talked to you?
>
> A. Objection, Your Honor.

See Pet. at 7-8.[2] The question asked is clearly a comment on Lips' right to remain silent and is objectionable under *Doyle*.

Military Rule of Evidence 103(a) states that a timely objection must be made to an error "stating the specific ground of the objection, *if the specific ground [is] not apparent from the context*" of the question. Mil. R. Evid. 103(a)(1) (emphasis added).[3] In addition, Rule 103(d) of the Military Rules of Evidence states that "[n]othing in this rule precludes taking notice of *plain errors* that materially prejudice substantial rights although they were not brought to the attention of the military judge." Mil. R. Evid. 103(d) (emphasis added).

Lips' contends that the ground for the objection is clear from context of the question and that the objection properly preserved the issue for appeal. The District Court agrees and holds that the defense counsel's "objection

---

[2] Not only did the military judge deny the defense counsel's objection, but he allowed the prosecutor to continue with this line of questioning. *See* Pet. at 8. In addition, the military judge failed to instruct the jury that it was not to consider the prosecutor's comments on Lips' post-arrest silence.

[3] Rule 103(a) also states the "standard provided in this subdivision does not apply to errors involving requirements imposed by the Constitution of the United States as applied to members of the armed forces." Mil. R. Evid. 103(a).

made during cross-examination preserved the issue for review." Pet. at 17a.

To argue that the defense counsel's objection "was inadequate to preserve the *Doyle* issue for review" under Military Rule of Evidence 103 is disingenuous, especially where the reason for the objection is obvious from the text of the question asked and Rule 103(d) provides that an objection is not necessary if the error alleged "materially prejudice[s] substantial rights [of an accused] although they were not brought to the attention of the military judge." Mil. R. Evid. 103(d).

2. *Issue Raised on Appeal*

The government also argues that Lips failed "to present the question of the prosecutor's cross-examination as an issue on appeal to the Air Force Court of Military Review." Resp. at 12. In his Petition to the Air Force Court of Military Review, Lips raised the *Doyle* issue and argued that "[t]hrough cross-examination, and again several times during his argument on findings, trial counsel relied on a theory that commenting upon a failure of appellant to speak up prior to his trial is appropriate to impeach appellant, a theory unsupported by law. *Doyle v. United States*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976)." *See* Pet. at 10 n.3. In addition, Lips discussed the types of questions the prosecutor asked on cross-examination, citing the record where the prosecutor "consistently utilized the attorney-client privilege to indicate that the appellant's version of the incident was somehow improperly withheld until trial . . . (R. 1235-42)." Pet. at 10 n.3.

Lips' counsel fully briefed the *Doyle* issue and the nature of the prosecutor's questions and closing arguments. In addition, the government's argument is contrary to the idea that appellate courts are to construe briefs liberally in determining issues presented on appeal. *See Kincade v. General Tire & Rubber Co.*, 635 F.2d 501, 504 (5th Cir. 1981) ("As a general rule, briefs are

read liberally with respect to ascertaining what issues are raised on appeal").

3. *Plain Error*

The government fails to address the District Court's finding that the prosecutor's comments on cross-examination denied Lips a fair trial and amounted to plain error.

As noted, the District Court holds that "even if the court did not find the issue preserved, it finds that under the plain error analysis, the continuous and repeated comment on [Lips'] post-arrest silence was 'obvious and substantial error that affected the fairness, integrity, or public reputation of judicial proceedings'." Pet. at 17a. In addition, the District Court holds that the prosecutor's comments were not harmless error. *Id.* at n.3, citing *United States v. Massey*, 687 F.2d 1348, 1353 (10 Cir. 1982) (discussing five factors relevant to determining whether prosecutorial comment on post-arrest silence is harmless).

The government argues that "[s]ince [Lips] has never established either 'cause' or 'actual prejudice' for his default [under *United States v. Frady*, 456 U.S. 152 (1982), Lips is] not entitled to raise the *Doyle* issue on collateral attack of his court-martial." *Id.* at 13. *See also Davis v. United States*, 411 U.S. 233 (1973); *Wainwright v. Sykes*, 433 U.S. 72 (1977) (pretrial right to silence claim).

The defendants in *Frady*, *Davis*, and *Sykes* failed to object to the alleged error at trial and failed to raise the alleged error on appeal before presenting the issue on collateral attack. In addition, in each case the evidence of guilt is overwhelming and the error (1) did not go to the heart of the judicial process, (2) did not present an issue of constitutional dimension, and (3) did not result in a miscarriage of justice. The defendant in each case also had the benefit of review by civilian judges before seeking collateral review in the federal courts which Lips did not.

In the present case, the defense counsel (1) objected at trial to the prosecutor's comments on Lips' post-arrest

silence during cross-examination and (2) raised the *Doyle* errors on appeal. In addition, the evidence in Lips is extremely close,[4] the error goes to the heart of the judicial process and the core of Lips' defense, and it left the jurors with the impression that Lips' silence could be considered as evidence of his guilt.

F. Defense Initiated Inquiry into Defendant's Post-Arrest

The government also argues that Lips, "not the government, initiated the inquiry into his post-arrest silence during direct examination and renewed that inquiry on redirect examination." Resp. at 13. "Having raised the issue of his post-arrest silence and having given his explanation for it, [Lips] could not then deny the prosecutor an opportunity to probe the issue on cross-examination and address it during closing argument." *Id.* at 14.

In support of its argument, the government relies on *United States v. Pino*, 827 F.2d 1429 (10th Cir. 1987), *Lebowitz v. Wainwright*, 670 F.2d 974 (11th Cir. 1982), and *United States v. Robinson*, 485 U.S. 25, 32 (1988).

The District Court concludes that "*Pino* is clearly distinguishable on its facts and does not apply in this case." Pet. at 16a. *Lebowitz* and *Robinson* are also easily distinguishable. In *Lebowitz* a "Florida court ruled that the cross examination and comment on Lebowitz's silence during the execution of a search warrant was probative

---

[4] The court believes that [Lips'] case, like *Johnson*[*v. Patterson*, 475 F.2d 1066 (10th Cir.), *cert. denied*, 414 U.S. 878 (1973)], was mainly a test of credibility of the victim and the petitioner. In such a case, the prosecutor's impermissible comment on petitioner's post-arrest silence is even more damaging. In similar situations when juries have been presented with two versions of the same incident, it has been held "where the case comes down to a one-on-one situation, *i.e.* the word of the defendant against the word of a key prosecution witness, and there is no corroboration on either side, the importance of the defendant's credibility becomes so significant that prosecutorial error attacking the credibility cannot be considered harmless beyond a reasonable doubt." *Velarde v. Shulsen*, 757 F.2d 1093, 1095 (10th Cir. 1985). Pet. at 16a.

and thus did not constitute a violation of due process." *Lebowitz v. Wainwright*, 670 F.2d 974, 980 (11th Cir. 1982). Lips' case involves a rape in which the outcome turns on "the credibility of the victim and [Lips]." Pet. at 16a. The search and seizure situation presented in *Lebowitz* is totally different from a situation where the jury's decision depends on which of two versions of the same incident it finds believable.

Similarly, the prosecutor's sole comment in *Robinson* on the defendant's post-arrest silence in closing argument, made with the permission of the trial judge to respond to comments presented by the defense counsel in argument, is totally different from the present case where the prosecutor made more than 50 comments on Lips' post-arrest silence during cross-examination and in argument on findings and sentencing.

G. Specific Intent Evidence Problem

The government does not deny that prosecutor introduced specific intent evidence under Mil. R. Evid. 404(b) to prove the general intent offenses with which Lips' was charged.[5] Like the trial court in *Lovely v. United States*, 169 F.2d 386 (4th Cir. 1948), *cert. denied*, 338 U.S. 834 (1948), the military judge in Lips's permitted the prosecutor to introduce evidence of plan, motive and intent to prove the same kind of general intent offense tried in *Lovely*. In *Lovely*, the Fourth Circuit held that the introduction of specific intent evidence was error in a general intent case where the outcome of the case turns on the credibility of the witnesses as it does in Lips' case. In the present case, Lips contends that the military court and the three military judges erred in permitting the introduction of specific intent evidence in the form of the

---

[5] Nor does the government deny that the military judge failed to instruct the jury on the 404(b) evidence, or deny that the prosecutor introduced the 404(b) evidence "to rebut [Lips'] contention that Carite had initiated sadomasochistic sex between them" before Lips testified or it was clear that he was going to testify. Resp. at 15.

65-minute videotape and four sexually explicit magazines and that the introduction of the evidence rendered his trial fundamentally unfair. *See Arizona v. Fulminante*, 111 S.Ct. 1246, 1266-67 (1991) (J. Kennedy concurring in the judgment) ("Apart perhaps, from a videotape of the crime [or a videotape simulation of the crime], one would have difficulty finding evidence more damaging to a criminal defendant's plea of innocence").

CONCLUSION

For the reasons stated, Counsel for Petitioner Lips respectfully requests that the Supreme Court of the United States GRANT the petition for a writ of certiorari in the present case.[6]

Respectfully submitted,

JAN HORBALY
5310 Renaissance Court
Burke, Virginia 22015
(703) 978-7909
Counsel for Petitioner

Date: January 12, 1994

---

[6] The government argues that the Lips' case should not be held for *Weiss v. United States*, 113 S. Ct. 2412 (1993) (No. 92-1482) "because petitioner did not raise [the issues presented in *Weiss*] in the military courts, the district court, or the court of appeals" and hence "they are waived here." Resp. at 7-8 n.2. The issues presented in *Weiss* are jurisdictional (whether a court-martial is properly constituted) and can be raised by petitioner at any stage in the proceedings.

The purpose of the HOLD FOR WEISS (No. 92-1482) is to preserve the secrecy of the decision in *Weiss* until the Courts' decision is announced. Lips' contends that the issues in his case were not fully and fairly considered by the military judges serving on the Air Force Court of Military Review. If the Court denies Lips' petition for certiorari, the public can conclude the Court has decided that "the designation and selection of military judges satisfies the Appointments Clause" and that "due process [does not] require a fixed term of office for military judges." To protect the secrecy of the Court's decision in *Weiss*, Lips' should be held until *Weiss* is announced.